

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

74-2596

MILDRED F. WOLF and HARRY WOLF,
Plaintiffs-Appellees,

-against-

INTERNATIONAL FOODS, a division of
International Industries, Inc.,

Defendant,

-and-

CHARLES KRAMER and HENRY H. DILLOF,
individually and as co-partners
practicing law under the firm name
and style of KRAMER & DILLOF,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Defendants-Appellants CHARLES KRAMER and HENRY H. DILLOF, individually and as co-partners, practicing law under the firm name and style of KRAMER & DILLOF (hereinafter referred to as "KRAMER"), hereby appeal from an Order of Honorable Justice Dudley B. Bonsal of the United States District Court for the Southern District of New York, entered November 13, 1974, which denied the Motion of Defendants-Appellants to add, as third-party defendants, the attorneys Edward Garfield and Allan P. White and the individuals and co-partners of the law firm of Greenbaum, Wolff & Ernst (hereinafter referred to as "Greenbaum").

It is the position of Defendants-Appellants that the Court erred in exercising its discretion in denying the Motion to Implead and further was in error in its application of the law as it relates to the attorneys Edward Garfield and Allan P. White and the law firm of Greenbaum in finding them not negligent. It is the position of Defendants-Appellants that, as a result of the Court's findings on the law as it relates to these parties, the Appellants are effectively precluded from ever bringing a separate action against the third-party defendants if this Order stands in the event that judgment in the future were rendered against them.

It is submitted by Defendants-Appellants that there are questions of fact with respect to the negligence of Edward Garfield and Greenbaum as to whether they were negligent as referring attorneys and clearly may be liable to the Appellants in the event judgment is rendered against the Appellants in the future.

It is further submitted by Defendants-Appellants that the Order of Judge Bonsal is unclear with respect to whether Allan P. White can be brought in as a third-party defendant since the Order is silent as to this party.

Issues Presented

Did the District Court err in the exercise of its discretion in denying the Motion to Implead the third-party defendants and, further, did it err in its application of the law as it related to the negligence of the referring attorneys, Garfield and/or Greenbaum.

Statement of Facts

The Complaint of the Plaintiffs in this action asserts that, on or about October 7, 1968, the Plaintiff MILDRED F. WOLF, while a customer at a restaurant known as the International House of Pancakes, 1586 Northern Boulevard, Manhasset, New York, owned and operated by the Defendant International Industries, Inc. (hereinafter referred to as

"INTERNATIONAL"), was served a hamburger sandwich in which a piece of rusty wire was embedded. The Plaintiff MILDRED F. WOLF bit into the hamburger sandwich and allegedly, as a consequence of the foregoing, sustained severe and permanent injuries to her teeth.

The Complaint further asserts that the Plaintiff MILDRED F. WOLF and her husband, HARRY WOLF, engaged the services of the Defendant law firm KRAMER relative to the prosecution of a claim or suit on their behalf as against Defendant INTERNATIONAL with reference to the personal injuries sustained. It is asserted in the Complaint that KRAMER failed to timely commence an action on behalf of the Plaintiffs as against Defendant INTERNATIONAL, thereby causing the Plaintiffs to lose their right of action. (pp. 7a to 15a*)

Following the events at the International House of Pancakes, the Plaintiffs contacted their personal attorney Edward Garfield. (44a) Mr. Garfield, on the date of the Plaintiffs' initial contact, was a partner or an agent, servant and/or employee of the law firm of Greenbaum. (39a)

After completing the initial preparatory work and making preliminary attempts at negotiation, Garfield alleges, through his attorney's Affidavit submitted in opposition to the Motion to Implead, that he referred the matter to KRAMER. (44a, 45a)

*References are to Appellants' Appendix.

In the third-party complaint it is alleged that the matter was actually referred to Allan P. White.

Garfield, in his attorney's affidavit, claims that he spoke to a Ms. Danify in KRAMER's office and was advised White was handling the matter. Garfield had the distinct understanding that White was an employee of KRAMER. (46a)

Garfield claims that not until the summer of 1973 was he advised that White was allegedly handling the case as an independent attorney. (46a)

It is submitted that questions of fact literally abound in this case at this very preliminary stage of the lawsuit, namely:

- 1) What was the relationship of Garfield and Greenbaum at the time of the alleged malpractice.

- 2) What was the relationship of White to the firm of KRAMER.

- 3) Was this matter referred or handled by White individually or as an alleged employee of KRAMER.

These questions of fact preclude any findings as a matter of law at this early stage of the lawsuit with respect to alleged negligence of the various parties.

POINT I

THE COURT ERRED IN THE EXERCISE
OF ITS DISCRETION IN DENYING THE
MOTION TO ADD THE THIRD-PARTY
DEFENDANTS AS PARTIES.

Rule 14(a) Title 28 Federal Rules of Civil Law and
Procedure states:

"At any time after commencement of the action a defending party as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiffs' claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action..."

The primary purpose of any procedure authorizing the impleader of third parties is as the Court stated in United States v. Edward R. Marden Corp., 294 F.Supp. 21 (D.C.R.I. 1968):

"...to avoid circuity of action and to dispose, in one litigation, of an entire subject matter arising from a particular set of facts, and to accomplish ultimate justice for all concerned with economy in litigation by avoiding two actions which should be tried together."

Impleader is available only against persons who are or may be liable to defendant for part or all of plaintiff's claim.

Whether a third-party defendant may be impleaded under Rule 14 is a question addressed to the sound discretion of the trial court. The court, in exercising its discretion,

should endeavor to effectuate the objective of Rule 14.

National Fire Ins. Co. of Hartford v. Daniel J. Keating Co., 35 F.R.D. 137 (W.D.Pa. 1964). Impleader should be allowed if it will avoid circuity of action and eliminate duplication of suits based on closely-related matters. Noland Co. v. Graver Tank & Mfg. Co., 301 F.2d 43 (C.A.4th 1962) and U. S. v. Edward R. Marden Corp., supra.

A timely application for impleader should be granted except when the third-party claim obviously lacks merit or it will delay the existing action.

In the instant case, there is substantial merit to defendants' claims as to the negligence of Edward Garfield, Greenbaum and White in allegedly allowing the Statute to run. There are questions of fact as to whether Garfield and/or Greenbaum referred the matter and to whom it was referred, namely KRAMER or Allan White, individually. All such parties so closely intertwined should be before this Court.

An unreasonable delay by the Defendant in seeking impleader may constitute an appropriate ground for denial of impleader. Merrit-Chapman & Scott Corp. v. Frazier, 289 F.2d 849 (C.A.6th 1960).

In the Merrit-Chapman case, supra, the Court denied defendants' motion to join persons allegedly guilty of negligence since the motion was untimely, the defendant having made it only a few minutes before commencement of the trial.

In Goldstein v. Compudyne Corp., 45 F.R.D. 457 (D.C.N.Y.1968) the defendant, who had not deliberately delayed the progress of the litigation, was permitted to file a third-party complaint four years after the commencement of the action. The court determined that denial of leave would unduly prejudice defendant and might allow the party primarily at fault to escape liability.

In the instant case, the Defendant KRAMER filed its Motion with the Court on July 16, 1974, two months after the service of its Answer. The Motion was then heard by the Court, four months after the service of the Answer. The Defendant KRAMER, similar to defendants in the Goldstein case, supra, were at no time dilatory or derelict in the preparation or presentation of the Motion nor did they attempt to delay the progress of the litigation.

It is submitted, therefore, that the Court was in error in exercising its discretion to deny the impleading of the third-party defendants.

POINT II

THE ORDER DENYING THIS MOTION SHOULD BE REVERSED SINCE THE COURT WAS IN ERROR IN FINDING THAT THE PROPOSED THIRD-PARTY DEFENDANTS WERE NOT NEGLIGENT AND ITS FINDING WAS BASED ON AN ERRONEOUS VIEW OF THE LAW.

The Court's determination to deny the motion should not be allowed to stand where such discretion was exercised on the basis of an erroneous view of the law. As was stated in the case of Ford Motor Co. v. Milby et al., 210 F.2d 137:

"While the bringing in of third-party defendants is a matter resting in the sound discretion of the trial judge, the exercise of the discretion will not be allowed to stand where based on erroneous view of the law...The discretion, furthermore, is one to be exercised upon sound principles; and only very unusual circumstances would justify the court in denying the joinder of one whose negligence is alleged to be the basis of the liability of the defendant named, as the joinder will enable the court to dispose of all questions arising out of such negligence in one trial."

In the instant case the Court misapplied the law with respect to the liability of a referring attorney for the negligence of the attorney to whom the matter is referred. In the case of Hill v. Curtis, 154 App. Div. 662, the court held that where the attorney of record and the referring attorney have agreed to share fees and expenses, the relationship is that of a joint venturer.

As joint venturers, they would be jointly and

severally liable for the acts of the venture and hence both attorneys would be liable to the client for malpractice for any negligence of either. Friedman v. Gettner, 6 A.D.2d 647, aff'd 7 N.Y.2d 764.

Clearly, as referring attorneys, Garfield or Greenbaum will be liable to the Plaintiffs along with White if White allowed the Statute to run. That will be so even if Garfield is later found to have acted as a reasonable, prudent attorney since he would still be liable for White's acts.

However, at this stage, on the bare facts contained in this Motion, there is no basis for the Court's findings as a matter of law that Garfield and Greenbaum were not negligent.

The Motion did not even contain Garfield's own affidavit as to what he did or didn't do following the referral of this matter. Certain, the Court should not decide issues of fact on a hearsay affidavit of a lawyer for his own client. Certainly, testimony by White and Danihy will be needed to resolve issues of fact with respect to Garfield.

As previously stated, the Court should only decide whether or not to bring parties in, not go on to make legal conclusions with respect to the liability of these additional parties.

As a result of the Court's making legal conclusions, if this Order is allowed to stand, to the great prejudice of the Appellants, they could not in the future even bring a

separate action against Garfield or Greenbaum since the finding in this Order precludes it.

It is submitted, therefore, this Order should be reversed.

POINT III

THE ORDER OF THE COURT ITSELF
IS INCOMPLETE

A reading of the Order of the Honorable Justice Bonsal does not indicate what position the Court took with respect to that portion of the Motion relating to the bringing in of Allan White or Garfield. It would appear from a reading of the Order that impliedly there is no preclusion of bringing White in since the Order is silent as to him. As to Garfield, it is also unclear.

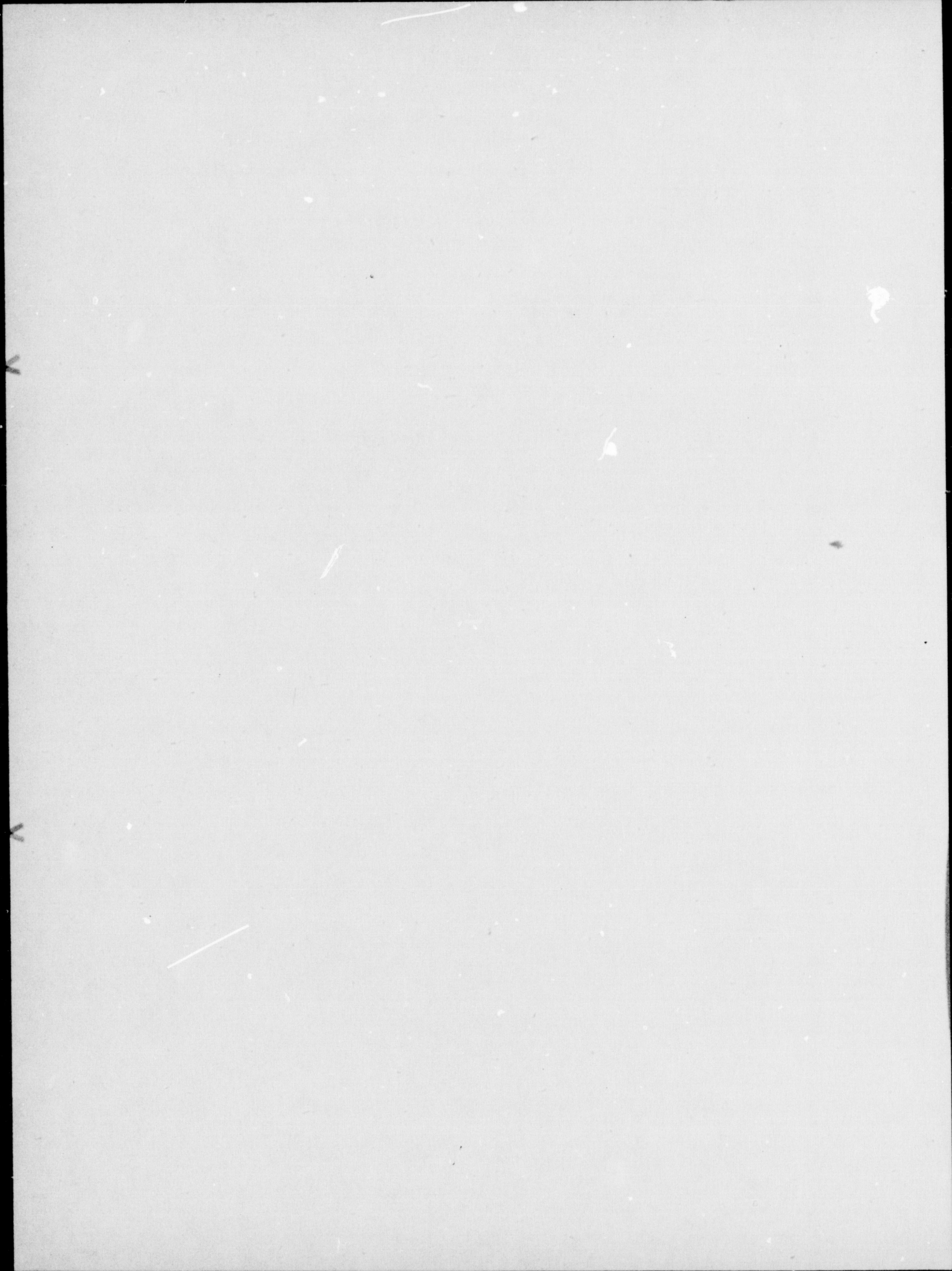
CONCLUSION

It is respectfully submitted that the District Court erred in dismissing the Motion of the Defendant third-party plaintiffs to implead the third-party defendants and that this Order should be reversed.

Respectfully submitted,

D'AMATO, COSTELLO & SHEA
Attorneys for Defendants-Appellants

New York, New York
August, 1975



STATE OF NEW YORK
COUNTY OF NEW YORK

DAVID BARRY being duly sworn deposes
and says: On August 22nd, 1978 I served the
within record on appeal brief appendix on *Greenbaum*
Walter Ernst the attorney for the appellee
respondent by leaving mailing three copies thereof
at his office located at *437 Madison Avenue*
New York, New York 10022

Sworn to before me
this 22nd day of

August, 1978

David Barry

Theresa Corless
THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1978